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November 19, 2007

***Via Hand Delivery***

Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12th Street, SW  
Room TW-A325  
Washington, DC 20554

Re: **Petitions of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Boston, New York, Philadelphia, Pittsburgh, Providence and Virginia Beach Metropolitan Statistical Areas, WC Docket No. 06-172**

Dear Ms. Dortch:

I am writing in response to several ex partes that XO and Covad have recently filed in the above-captioned proceeding.<sup>1</sup> XO takes issue with Verizon's claim that CLECs have failed to provide meaningful data in this proceeding, stating that "from the very beginning" it has "been forthcoming with data regarding facilities-based competition in the markets at issue." XO Oct. 30 Letter at 2; *see* XO Nov. 2 Letter at 1. XO's letters prove exactly the opposite, however, and confirm Verizon's claims. XO's submissions also demonstrate that the data CLECs have been withholding are likely to show far more competition than the data to which Verizon has access.

**Failure of CLECs to Submit Data**

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<sup>1</sup> See Letter from John Heitmann, Kelley Drye & Warren, LLP, to Marlene Dortch, FCC, WC Docket No. 06-172 (Oct. 30, 2007) ("XO Oct. 30 Letter"); Letter from John Heitmann, Kelley Drye & Warren, LLP, to Marlene Dortch, FCC, WC Docket No. 06-172 (Nov. 2, 2007) ("XO Nov. 2 Letter"); Letter from Genevieve Morelli, Kelley Drye & Warren, LLP, to Marlene Dortch, FCC, WC Docket No. 06-172 (Nov. 13, 2007) ("XO/Covad Nov. 13 Letter").

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Verizon has submitted voluminous data demonstrating there is extensive facilities-based competition in each of the six MSAs, and has updated that information throughout the course of this proceeding in response to new developments. These data include maps of the availability of cable telephony, maps of known competitive fiber routes, data on wire centers with known competitive fiber, maps and data on known CLEC-lit buildings, E911 listings data that provide a reasonable approximation of levels and growth of competitive lines, data from Verizon's wholesale records showing how many lines competitors serve using a combination of their own facilities and Verizon's special access services, and statements from CLECs's own websites describing their extensive facilities and service offerings. Verizon has submitted these data on both an MSA and wire-center basis.

After more than 13 months, XO has finally stepped forward to provide the number of lit buildings it serves in the six MSAs at issue and how many buildings it believes to be within 500 and 1000 feet of its network. *See* XO Oct. 30 Letter at 5, Table 3 & 9, Table 7. Unfortunately, XO does not provide other relevant data, such as the maps of its network facilities, the numbers of customers it is serving over its network and at various locations, the types of services it is capable of providing, and its use of third-party competitive facilities. Moreover, XO is the *only* CLEC thus far to provide the number of buildings it currently serves and is capable of reaching. Thus, far from an "empty slogan," XO Oct. 30 Letter at 1, Verizon's claim that CLECs have withheld relevant data is an unfortunate fact, and XO's recent filing is the exception (albeit a narrow one) that proves the rule.

XO argues that it and other CLECs previously provided the percentage of buildings lit by CLECs in selected wire centers, based on data from GeoResults. *See* XO Oct. 30 Letter at 2-4; XO Nov. 2 Letter at Attachment; XO/Covad Nov. 13 Letter at 2. But the information that XO and other CLECs previously submitted merely provided counts of buildings actually lit, not those within reach of CLEC networks, nor any of the other information described above that XO and others continue to withhold. Moreover, as Verizon has explained, GeoResults data are not a substitute for CLECs' own information, particularly given Verizon's experience that such data is incomplete and understates the presence of competitors and the availability of competitive options. Although Verizon must rely on GeoResults data as the best available source of information about CLEC-lit buildings, the same is not true of CLECs who have first-hand information about their lit buildings and the locations of their networks. Given the CLECs' failure to provide this first-hand information, the Commission should presume that such data would show competing carriers have deployed even more fiber than what GeoResults suggests.

XO's "summary of data submitted by the competitive industry" in this proceeding further demonstrates that competing carriers have withheld meaningful data. *See* XO Nov. 2 Letter at Attachment. Four of the 14 submissions XO cites involve the initial and reply comments of cable companies (the initial comments of Comcast, Cox, and Time Warner Cable; and the reply comments of Charter). Two additional examples are the October 9, 2007 submissions of Time Warner and RCN in response to requests from the Commission's staff for additional information. As the Commission acknowledged in

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sending each of the cable operators a request for additional information on October 30, 2007, however, these companies' previous submissions omitted from their previous filings the most relevant types of information, such as the number of locations they are capable of serving with their networks and their customer counts in particular geographic areas. While several of the cable companies have filed additional data in response to the Commission's request, other CLECs have not been similarly forthcoming.

The eight other examples cited by XO are equally unconvincing. The first is the initial comments by ACN and 20 other competitive carriers. But this filing contained no data whatsoever for these carriers; it merely repackaged the state-level data that the FCC reports in its semi-annual local competition surveys. XO next cites the initial comments of Time Warner Telecom, Cbeyond, and One Communications. But this filing did not contain any of these carriers' own data either; it merely supplied aggregate data from the GAO's report on special access, plus snippets from the filings that various *other* competitors made in various FCC dockets dating back to 2003. Moreover, as Verizon has previously explained, one of the problems with the GAO report is that it is based on incomplete data due to the CLECs' failure to provide GAO with detailed information about their networks. XO next cites an April 18, 2007 ex parte by Covad, NuVox, and XO; this letter merely summarized the data that the cable companies had submitted, which as discussed above are incomplete. XO's next two examples are ex partes filed by Comptel (on September 4th and 9<sup>th</sup>, 2007), which address the reliability of the E911 data that Verizon submitted; they do not provide any carrier data relevant to the six MSAs at issue. XO's final example is an October 5, 2007 ex parte by Covad, NuVox, and XO. This letter merely provided letters that these carriers had previously filed in the Verizon/MCI merger proceeding; it contained no specific data for the MSAs at issue.

In sum, although XO has gone through the submissions of competing carriers in this proceeding with a fine tooth comb, it is unable to identify a single example where CLECs have submitted meaningful data. Even XO's own recent submissions, although a step in the right direction, continue to withhold relevant data. And the fact that it has taken XO more than 13 months to file the most basic information about its network shows that, contrary to its claims, it and other carriers have hardly been "forthcoming" in this proceeding. Under well-established precedent, the Commission must infer that data that competitors obviously maintain but have purposely withheld are unfavorable to them. *See, e.g., International Union, UAW v. NLRB*, 459 F.2d 1329, 1336 (D.C. Cir. 1972) ("[W]hen a party has relevant evidence within his control which he fails to produce, that failure gives rise to an inference that the evidence is unfavorable to him.").

XO's letter demonstrates that data CLECs have been withholding are not only unfavorable to them, but also are likely to show far more competition than the data to which Verizon has access. XO provides data on the percentage of commercial buildings within 500 and 1000 feet of its network, which show that XO is capable of serving far more locations than it already does. For example, while XO claims to serve only 50 lit buildings in the Philadelphia MSA, which it claims represents 0.02 percent of commercial buildings in the MSA, XO acknowledges that its network is within 1000 feet of 6 percent of commercial buildings – or *30 times* the amount that XO actually serves. *See* XO Oct. 30 Letter at 6, Table 4 & at 9, Table 7. In New York, Pittsburgh, and

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Boston, XO's network is likewise capable of serving more than 40, 17, and 16 times, respectively, the number of buildings XO currently has lit. *See id.* And this means that XO is capable of serving locations that account for a much larger share of the relevant high-capacity services because of the heavy degree to which those services are concentrated geographically. As the Commission has recognized, a relatively small number of buildings – typically large office buildings in downtown areas – account for a very large share of total demand. *See Triennial Review Order* ¶ 298 (“the record shows that competitors have built fiber loops to buildings that carry a significant portion of the competitive traffic in certain MSAs.”). XO and other CLECs have targeted these prime buildings with their networks and, therefore, are capable of serving a far greater share of total demand than the number of buildings they reach suggests.

Although XO's data demonstrate that it and other CLECs are capable of serving far more buildings than they already do, XO argues that the percentage of buildings that CLECs are able to address with their networks is still small overall, based on its claim that XO reaches only a small percentage of buildings and it “is one of the top competitive providers in each of these markets.” XO Oct. 30 Letter at 10. As an initial matter, XO's calculation of the percentage of buildings it serves and is capable of serving compares *all* commercial locations, rather than locations at which there is demand for high-capacity services. Such demand is concentrated in commercial office buildings, the total number of which is only about one-sixth the number of total commercial locations (which includes every dry cleaner, church, gas station, and other small business locations). *See* U.S. Dep't of Commerce, *2007 Statistical Abstract of the United States* at Table 970, available at <http://www.census.gov/prod/2006pubs/07statab/construct.pdf> (824,000 office buildings nationwide compared to 4.6 million commercial locations). Moreover, as the Commission has acknowledged, demand is concentrated further still in large office buildings in downtown areas. *See Triennial Review Order* ¶ 298 (“the record shows that competitors have built fiber loops to buildings that carry a significant portion of the competitive traffic in certain MSAs.”).

In addition, there is no merit to XO's claim that its building count and reach are representative of other carriers, because it is one of the “top” CLECs in the six MSAs. In terms of lit buildings, XO is not in fact one of the major CLECs, or even close – based on the data Verizon has submitted, XO ranks seventh in the New York and Philadelphia MSAs, fifth in the Boston MSA, and ninth in the Pittsburgh MSA. *See* Letter from Joseph Jackson, Verizon, to Marlene Dortch, FCC, WC Docket No. 06-172, at Exh. 2 (Oct. 10, 2007) (“Verizon Oct. 10 Ex Parte”). In each of these MSAs, XO's count of lit buildings is less than one-tenth the number of lit buildings of the “top” CLEC in the MSA. *See id.* And like XO, these other carriers are clearly capable of serving a far larger number of buildings than they currently do.

#### GeoResults Data

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Verizon's petitions included maps that, using data from GeoResults, showed the locations of CLEC-lit buildings in each of the six MSAs.<sup>2</sup> More recently, Verizon submitted additional detail, initially filed in the special access proceeding (WC Docket No. 05-25), of the specific buildings where competitive fiber networks are located based on data from GeoResults. *See* Verizon Oct. 10 Ex Parte at Exhs. 1 & 2.

In addition to the list of CLEC-lit buildings based on data from GeoResults, in the special access proceeding Verizon also used data from AT&T and another competitive carrier to a limited extent. The data from AT&T included AT&T's own lit buildings, while the data Verizon received from the other carrier contained lit building data for multiple carriers. *See* Declaration of Kenneth J. Martinian ¶ 10, *attached to* Comments of Verizon, WC Docket No. 05-25 & RM-10593 (FCC filed Aug. 8, 2007). Verizon used these other data sources because, when it compared them to GeoResults, it found that GeoResults was incomplete and did not include all CLEC lit buildings included in these other sources. Verizon did not replace the GeoResults data for certain carriers, nor did Verizon use the data from AT&T or the other competitive carrier in reporting carrier-specific lit-building totals; Verizon used these other data sources only when providing aggregate statistics about CLECs (such as the number of fiber providers in an MSA). Thus, the carrier-specific lit-building totals that Verizon provided – both in this proceeding and in the special access proceeding – were based exclusively on GeoResults data.<sup>3</sup>

Although Verizon submitted GeoResults data, it has explained that that these data are incomplete and understate the extent of competitive facilities. Verizon nonetheless has used these data because it does not have direct evidence of buildings that CLECs serve using their own facilities. In an effort to defend the CLECs' failure to supply such direct evidence, XO argues that the GeoResults data are "reasonably accurate," based on a comparison of XO's own data to that of GeoResults. XO Oct. 30 Letter at 5; *see* XO/Covad Nov. 13 Letter at 1-3. But XO concedes that GeoResults excludes data from two of the top 30 CLECs as well as from smaller providers. *See* XO/Covad Nov. 13 Letter at 4. Moreover, XO's comparison of its data to GeoResults shows discrepancies that validate Verizon's concerns. XO Oct. 30 Letter at 4, Table 2. In Pittsburgh, for example, it shows that XO's building count is 114 higher than the GeoResults total. Given that XO's total number of lit buildings is relatively small in each MSA, these differences even themselves out and show that XO's own reported lit buildings across the

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<sup>2</sup> *See* NY Pet'n at 22-23; NY Decl. ¶ 46 & Exhs. 5-6; Boston Pet'n at 20-21; Boston Decl. ¶ 40 & Exhs. 5-6; Phil. Pet'n at 22-23; Phil. Decl. ¶ 42 & Exhs. 5-6; Pitt. Pet'n at 20-21; Pitt. Decl. ¶ 36 & Exhs. 5-6; Providence Pet'n at 20-21; Providence Decl. ¶ 38 & Exhs. 5-6; Va. Beach Pet'n at 20; Va. Beach Decl. ¶ 37 & Exhs. 5-6.

<sup>3</sup> Verizon's cover letter submitting these data in this proceeding suggested that Verizon supplemented GeoResults data with data Verizon received from AT&T and another competitive carrier. *See* Verizon Oct. 10 Ex Parte at 2. That is not the case. As indicated on the exhibit containing the actual data, the list of CLEC-lit buildings is based exclusively on GeoResults. *See id.* at Exh. 2. XO's claim that "Verizon chose not to use GeoResults-based data for AT&T and 'another competitor,' presumably Qwest" is therefore incorrect. XO Oct. 30 Letter at 4. Verizon did not substitute data from AT&T and another carrier for GeoResults data; the carrier-specific totals Verizon submitted were the totals reported by GeoResults.

four MSAs is only 8 percent higher than what GeoResults reports. But this is hardly sufficient proof that other CLEC data would shake out the same way, given the wide MSA-by-MSA gaps in percentage terms. Indeed, XO's comparison (at Exhibit A) of Qwest's "Wholesale List of On-Net Buildings" to "GeoResults' Number of Qwest Lit Buildings" [Begin Confidential]

[End Confidential]

Finally, XO claims that Verizon's data showing buildings with competitive fiber "include entities that are not competitive carriers" or carriers that have gone out of business. XO Oct. 30 Letter at 6. But there is no basis to exclude such data. The fact that some large customers may be self-supplying their own fiber is further evidence of competition, regardless of whether these customers make their facilities available to CLECs or other parties. Indeed, it is well established that firms who self-supply competitive facilities impose pricing discipline and must be included in the analysis regardless of whether they choose to offer their facilities on a wholesale basis.<sup>4</sup> The same is true of fiber that has been deployed by firms that have gone out of business. As the Commission has recognized, once fiber has been deployed and the cost sunk, it exerts competitive discipline regardless of whether it is being used, because such fiber can be acquired at any time by a firm seeking to enter the building. *See Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers*, Fifth Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 14221, ¶ 80 (1999). In fact, over the past few years there have been numerous instances where competitive providers have acquired the facilities and assets of other providers.<sup>5</sup>

If you have any questions, please let me know.

Sincerely,



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<sup>4</sup> See, e.g., *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 389 (1999) (faulting the Commission for failing to consider carriers that self-provide facilities in evaluating competitive alternatives); U.S. Dep't of Justice & Federal Trade Comm'n, *Horizontal Merger Guidelines* § 1.31 (1992) (the relevant market begins with all firms that currently produce or sell in the relevant market, including "vertically integrated firms to the extent that such inclusion accurately reflects their competitive significance in the relevant market").

<sup>5</sup> See, e.g., Time Warner Telecom Press Release, *Time Warner Telecom To Acquire Xspedius Communications for \$531.5 Million* (July 27, 2006) (Time Warner Telecom Chairman, CEO, and President Larissa Herda: "This strategic acquisition further expands our network reach and market density for serving multi-location and multi-city enterprise customers, increasing the number of markets we serve from 44 to 75"); Level 3 Press Release, *Level 3 Completes Looking Glass Networks Acquisition* (Aug. 3, 2006) (Level 3 acquired Looking Glass Networks, Inc., whose network included approximately 2,000 route miles serving 14 major metro markets, with lit fiber connectivity to approximately 215 buildings, and dark fiber connectivity to approximately 250 additional buildings).

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cc: Nick Alexander  
Marcus Maher  
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